



**ISSUE DATE: 02 APRIL 2015**

BALCA CASE NO: 2015-TLN-00035  
ETA CASE NO: H-400-15026-458024

*In the matter of:*

**COUNTRYSIDE INDUSTRIES, INC.**

### **Decision and Order Affirming Denial**

Countryside Industries, Inc. (Countryside) objects to the Certifying Officer's denial of a temporary alien labor certification application it made under the H-2B visa program. This proceeding at the Board of Alien Labor Certification Appeals (BALCA) reviews the Certifying Officer's action;<sup>1</sup> a judge may affirm a denial; direct the Certifying Officer to grant the application; or remand the matter for more action.<sup>2</sup>

Countryside seeks to bring 50 workers to the United States to do landscaping and grounds maintenance from April 1 to December 1, 2015 throughout the greater Chicago area. Somewhat different wages prevail in those counties for identical work. To preclude the use of foreign labor at low wages, which would drive down wages in the U.S., certification requires that the employer first advertise the jobs to workers in the United States and pay the highest applicable wage for its worksites. The advertising Countryside had to do gave a wage range when the regulation requires it to advertise and offer one wage—the highest prevailing wage. The denial is affirmed.

#### **A. Statement of the Case**

Countryside has filed two applications for foreign labor certification for work during 2015. Its first, submitted in December 2014, bungled the requirement to recruit workers in the United States before turning to foreign, nonimmigrant workers. Countryside had

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<sup>1</sup> Admin. R. P66-72; 20 C.F.R. § 655.33(a) (authorizing review).

<sup>2</sup> 20 C.F.R. § 655.33(e).

made its efforts to recruit U.S. workers too long before the jobs would begin. The Certifying Officer also had pointed out on initial review of that first application that the wage range advertised in newspapers and the wage range in the application<sup>3</sup> had to be consistent.<sup>4</sup> Countryside recognized its error in the dates its job advertisements ran. It re-advertised and refiled.<sup>5</sup>

Countryside submitted on January 26, 2015 this new (*i.e.*, refiled) Application for Temporary Labor Certification. The Certifying Officer's initial review led to a Request for Further Information (Request)<sup>6</sup> on February 2, 2015 that raised three deficiencies. Countryside replied promptly, but could only satisfy one of the shortcomings. The denial followed for failure to meet all domestic recruitment requirements for certification. The arguments Countryside made fail to persuade me the Certifying Officer erred.

Discussion of this application requires an understanding of labor certification process. The H-2B visa program is described before the Certifying Officer's actions are analyzed.

## **B. Labor Certifications by the Secretary of Labor**

The H-2 labor program that regulates the temporary admission and employment of non-immigrant foreign workers, first created in the Immigration and Nationality Act of 1952<sup>7</sup> (INA), as amended, split in 1986 into two distinct programs. The program for agricultural workers is not involved here. This application sought certification from the Secretary of Labor, under § 101(a)(15)(H)(ii)(b) of the INA,<sup>8</sup> to bring 50 non-agricultural workers to the United States.<sup>9</sup>

Labor certification is a precondition for an alien worker to obtain H-2B immigration status from the Department of Homeland Security.<sup>10</sup> The H-2B visa classification for a temporary worker not employed in agriculture admits a foreign worker to the United States who has "a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other [than agricultural] temporary service or labor if unemployed

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<sup>3</sup> The Labor Certification application is DOL Form 9142.

<sup>4</sup> Admin. R. P2. The specific advice from the Certifying Officer is not part of this administrative record. The record in that earlier cases has not been offered.

<sup>5</sup> Admin. R. P2.

<sup>6</sup> 20 CFR §655.23(c)(1).

<sup>7</sup> 8 U.S.C. § 1101, et seq.

<sup>8</sup> Codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

<sup>9</sup> H.R. Rep. No. 99-682, pt. 1, at 80; see also Immigration Reform and Control Act of 1986, Pub. Law No. 99-603, § 301(a), 100 Stat. 3359, 3411 (codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a)).

<sup>10</sup> 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 214.2(h)(6)(iii) (2009).

persons capable of performing such service or labor cannot be found in the country.”<sup>11</sup>

Section 214(c)(1) of the INA, as amended,<sup>12</sup> requires that an employer petition the Department of Homeland Security to classify a prospective temporary worker as an H–2B non-immigrant. Adjudication of that petition allows the worker to obtain an H–2B visa from the Secretary of State.

U.S. Citizenship and Immigration Services (USCIS) is the component within the Department of Homeland Security that adjudicates petitions for H–2B status.<sup>13</sup> Section 214(c)(1) of the INA<sup>14</sup> requires the Secretary of Homeland Security to consult with “appropriate agencies of the Government” about its H–2B decisions.<sup>15</sup> The Secretary of Homeland Security consults with the Secretary of Labor because the Department of Labor is in the best position to advise Homeland Security on whether “unemployed persons capable of performing such service or labor cannot be found in this country.”<sup>16</sup>

The Secretary of Homeland Security and the Secretary of Labor have jointly determined<sup>17</sup> that the best way to consult is to require that, before an employer files an H–2B petition at Homeland Security, it must first obtain a temporary labor certification from the Secretary of Labor.<sup>18</sup> Certification by the Secretary of Labor shows:

1. that the employer has indeed made unsuccessful efforts to recruit a U.S. worker for the job it seeks to admit an H–2B worker to perform, and
2. each H–2B worker, and any U.S. worker the employer successfully recruits for the work, will be paid no less than the prevailing wage for that work in the geographic area of the job, a wage level the Secretary of Labor sets.<sup>19</sup>

The Secretary of Labor thereby assures USCIS that U.S. workers capable of performing the services or labor are unavailable, and

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<sup>11</sup> 8 U.S.C. §1101(a)(15)(H)(ii)(b); see also 8 C.F.R. § 214.2(h)(1)(ii)(C).

<sup>12</sup> Codified as 8 U.S.C. § 1184(c)(1).

<sup>13</sup> See 8 C.F.R. § 214.2(h)(6) et seq.

<sup>14</sup> 8 U.S.C. 1184(c)(1).

<sup>15</sup> 8 U.S.C. § 1184(c).

<sup>16</sup> See WAGE METHODOLOGY FOR THE TEMPORARY NON-AGRICULTURAL EMPLOYMENT H–2B PROGRAM, PART 2, published at 78 Fed. Reg. 24047, 24048 (Apr. 24, 2013), *relying on*, 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

<sup>17</sup> See 78 Fed.Reg. at 24048 (Apr. 24, 2013).

<sup>18</sup> 8 C.F.R. § 214.2(h)(6)(iii)(A).

<sup>19</sup> 78 Fed. Reg. 24047, 24048; 8 C.F.R. § 214.2(h)(6)(iv)(A).

admission of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers.

A Certifying Officer of the Office of Foreign Labor Certification, a part of the Employment and Training Administration of the U.S. Department of Labor, disposes of applications for temporary labor certifications on behalf of the Secretary of Labor.<sup>20</sup>

### C. This application

Countryside requested one prevailing wage determination for the many worksites included in its Application for Temporary Employment Certification. “Certification of more than one position may be requested on the application as long as all H–2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.”<sup>21</sup> And, “except where otherwise permitted under [20 C.F.R.] § 655.3, only one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer.”<sup>22</sup> That area is metropolitan Chicago.

The Certifying Officer’s initial review of the application led to a Request for Further Information (Request)<sup>23</sup> that raised two interrelated recruitment problems with Countryside’s application:

- A failure to comply with recruitment requirements<sup>24</sup>; and
- A failure to comply with pre-filing recruitment requirements.<sup>25</sup>

The work would be done in the Illinois counties of Cook, Kane, Kendall, Lake, Kankakee, McHenry, Will and DuPage.<sup>26</sup> The highest prevailing hourly wage, as the Department of Labor computes it, for

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<sup>20</sup> 20 C.F.R. § 655.23(c)(3) (2009). The U.S. District Court for the Northern District of Florida entered a stay on May 16, 2012 that blocked revisions the Secretary of Labor published on Feb. 21, 2012 to H–2B program regulations, which would have been codified as 20 CFR Part 655, Subpart A. *See* 77 Fed. Reg. at 10038-10109 and 10147-10169. The notice the Secretary gave that those revisions would not go into effect was published at 77 Fed. Reg. at 28764 (May 16, 2012). In *Bayou Lawn & Landscape Services v. Sec. of Labor*, 713 F3d 1080 (11th Cir. 2013), the Court of Appeals affirmed the stay. This leaves the regulations first published at 73 Fed. Reg. at 78020-78069 (Dec. 19, 2008) as the controlling regulations. All references are to the 2009 version of the Secretary’s H–2B regulations in the C.F.R., which codified the late 2008 Federal Register publication, unless stated otherwise.

<sup>21</sup> 20 § 655.20(d).

<sup>22</sup> 20 C.F.R. § 655.20(e).

<sup>23</sup> 20 C.F.R. §655.23(c)(1).

<sup>24</sup> (20 C.F.R. §§ 655.22(e) and 655.10(b)(3).

<sup>25</sup> (20 C.F.R. §§ 655.15(e)(2) and 655.17(f)(3).

<sup>26</sup> Admin. R. P123, P126.

landscaping and grounds maintenance in those counties is \$12.72.<sup>27</sup> When Countryside advertised the jobs in local Chicago-area newspapers, it hedged by 40 cents per hour. Its help-wanted ads said Countryside “will offer a wage of \$12.32—\$12.72/hr.”<sup>28</sup> The wages for the work sites Countryside listed in its application do vary, mostly within that range.<sup>29</sup> Yet when Countryside’s application encompasses “one area of intended employment” as that term is defined in 20 C.F.R. § 655.4, there is but one prevailing wage to be paid: the highest prevailing wage. The Certifying Officer requested that Countryside show that its labor condition application gave the correct wage, that its job order<sup>30</sup> disclosed the correct wage, and the newspaper advertisements seeking domestic workers for the jobs published the correct wage.<sup>31</sup>

Unable to do so, Countryside argued instead that:

The temporary labor opportunity involves multiple worksites within the Chicago land area of intended employment. The location and number of worksites and, therefore, the appropriate corresponding relevant prevailing wage, are still be[ing] contracted and to be determined. The prevailing wage offered and advertised was based upon the highest applicable wage among all relevant worksites.

Due to the nature of the landscaping season and businesses still-to-be-contracted worksites, the employer does not yet know, nor have all the data necessary, to definitively state the 2015 labor demand and its corresponding relevant worksites. The employer has indicated the wage range determined by the Department of Labor and fully intends to offer and compensate its temporary workforce with the highest prevailing wage for all relevant worksites. However, at this time, it is impossible to know the distribution of its labor force for the season.<sup>32</sup>

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<sup>27</sup> Admin. R. P124. The cities and townships involved would be Chicago, Schaumburg, Palatine, South Barrington, Barrington, Elgin, Aurora, Oswego, Wauconda, Bedford Park, Morton Grove, Joliet, Lake Forest, Algonquin, Hillside, Skokie, Long Grove, Richmond, Hoffman Estates, Des Plaines, Deer Park, Buffalo Grove, Romeoville, Lincolnshire, Gurnee, Genoa City, St Charles, Woodridge, Wheeling, Rochelle, Batavia, Vernon Hills, Fox Lake, Round Lake, Mendota, Lake Zurich, Franklin Park, Northbrook, Volo, Wauconda, Arlington Heights, West Chicago, Huntley, Glenview, Lombard and Hampshire. Admin. R. P54.

<sup>28</sup> *See, e.g.*, Admin. R. P49.

<sup>29</sup> The wage rate for Kankakee, IL drops to \$10.99 per hour. Admin. R. P58.

<sup>30</sup> The two copies of the job order verification at Admin. R. P41 & P105 distributed through IllinoisJoblink.com don’t show the wage offered.

<sup>31</sup> Admin. R. P116–118.

<sup>32</sup> Admin. R. P75.

As to pre-filing recruitment, Countryside stated that the newspaper “advertisement contains all of the information required by 20 C.F.R. sec. 655.17.”<sup>33</sup>

**D. The reply and denial of certification**

The Certifying Officer remained unconvinced. He told Countryside:

While it is understandable that the employer may not know all the exact locations for its customers for the upcoming season, the employer must identify the areas it will work in and, per H-2B regulations, must pay the highest of the prevailing wages among all the locations it filed under a single H-2B application. Based on the worksites identified in Section F, Item 7a, if the ETA Form 9142 and in the Addendum to Section F, of the ETA Form 9141, Prevailing Wage Determination, the highest applicable wage among all relevant worksites listed is \$12.72 per hour.

Countryside’s response also failed to demonstrate it met the pre-filing recruitment requirements. The Officer concluded:

In response to the Request for Information, the employer submitted copies of the newspaper advertisements which indicate that work will be performed in Lake, Cook, McHenry, Kane, Kendall, DuPage and Will Counties and further indicated a wage offer of \$12.32 to \$12.72 per hour. However, based on the employer’s ETA Form 9141, Prevailing Wage Determination, \$12.72 per hour has been determined to be the highest applicable wage among all relevant worksites. Therefore, the submitted newspaper advertisements are not in compliance with Departmental regulations at 20 C.F.R. sec. 655.17(g), which state that “all advertising must contain the wage offer, or in the event that there are multiple wage offers, each of which must not be less than the highest of the prevailing wage, the Federal minimum wage, state minimum wage, or local minimum wage applicable throughout the duration of the certified H-2B employment.” The employer failed to overcome this deficiency; therefore, the application is denied.<sup>34</sup>

**E. Discussion**

As the applicant, Countryside shoulders an affirmative burden to satisfy the requirements for the labor condition application it

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<sup>33</sup> Admin. R. P77.

<sup>34</sup> Admin. R. P66–72.

seeks.<sup>35</sup> The hedging in the wage offered in its advertisements doesn't satisfy the Secretary's regulations. Countryside published a generic advertisement to U.S. workers, meant to encompass all counties and townships where Countryside anticipates its maintenance and grounds keeping employees would labor, *i.e.*, in its "area of intended employment." It cataloged them in its Labor Condition Application at Section F. Item 7.a and in the Addendum at Section F. Countryside doesn't know if a given worker would be assigned to a higher wage or lower wage county or township. It can't yet know what it would have to pay any specific worker. Neither does a potential worker who reads its advertisement. The implication of a range is that the wage paid is unlikely to be the highest figure.

The regulations anticipate this situation. An employer that chooses to ask for a package certification encompassing areas with different wage rates for the same job must advertise and pay the highest wage, no matter where the work may be done.<sup>36</sup> A wage no less than \$12.72 must be paid and advertised here. A lesser amount won't do. Nor will a range, even when the upper end of that range is the correct amount.<sup>37</sup>

Countryside cannot be surprised, when the regulations tell the employer exactly what to do:

If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the same opportunity and staff level within the area of intended employment, the prevailing wage shall be based on the highest applicable wage among all relevant worksites.<sup>38</sup>

Countryside argued that it gave the range of prevailing wages for all counties involved as it advertised and recruited, just as it had in years past.<sup>39</sup> Those applications are not part of the administrative record, so I have no way of verifying the claim. Assuming it is true (which well maybe so), the Secretary is not required to continue an error. The regulation at 20 C.F.R. § 655.10(b)(3) is adequate notice of what is required.

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<sup>35</sup> "The proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d); *see also, Director, O.W.C.P v. Greenwich Collieries, Inc.*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 101 n. 21, 101 S. Ct. 999 (1981);

<sup>36</sup> "The wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers, each of which *must not be less than the highest of the prevailing wage*, the Federal minimum wage, State minimum wage, or local minimum wage applicable throughout the duration of the certified H-2B employment . . ." 20 C.F.R. § 655.17(g) (emphasis supplied).

<sup>37</sup> *Cross Roads Masonry*, 1010-TLN-00030 (Jan. 25, 2010).

<sup>38</sup> 20 C.F.R. § 655.10(b)(3).

<sup>39</sup> Admin. R. P76.

The denial by the Certifying Officer was correct, and is affirmed.

San Francisco, California

William Dorsey  
ADMINISTRATIVE LAW JUDGE